[IE] Three Strike Copyright Rule Approved

IRIS 2010-6:1/34

Marie McGonagle
School of Law, National University of Ireland, Galway

The Irish High Court on 16 April 2010 approved a settlement agreed in earlier litigation (January 2009) between a number of record companies (EMI, Sony, Universal and Warner) and Eircom, an Internet service provider which has about 40% of the market share. The settlement provided for a three strike approach to dealing with copyright infringement. On first detection a notice from Eircom would inform the subscribers that they had been detected infringing copyright; on a second infringement, they would receive a warning that unless they desisted they would be disconnected from the service; and finally, on a third infringement, the service would be discontinued, apart from telephone or television internet access. As part of the settlement the parties agreed to negotiate a protocol governing their respective sides of the bargain. The main points of the protocol were: to provide an education and awareness campaign; to phase in implementation of the settlement with a three-month pilot programme; and to include exceptions to the ultimate sanction.

One of the parties consulted the Data Protection Commissioner about the terms of the settlement and he raised three issues under the Data Protection Acts 1988-2003. The first question was whether data comprising IP addresses constituted “personal data” for the purposes of the Data Protection Acts. The judge decided that the data involved did not constitute “personal data” under the Acts as the settlement did not involve the identification of any infringer and its entire purpose was to uphold the law.

The second question concerned the final step in the settlement, namely the termination of the subscribers’ access to the service, and whether it prejudiced their fundamental rights and freedoms. This issue involved consideration both of the Acts and the Irish Constitution, as copyright is recognised as a fundamental right under the Constitution. The judge found that there was nothing disproportionate in the settlement and that there were adequate procedural safeguards, as well as conformity with Article 1(b) of Directive 2009/140/EC, although the Directive has not yet been transposed into Irish law. The final step of the settlement, therefore, did not prejudice the fundamental rights and freedoms of subscribers.

The third question posed by the Data Protection Commissioner consisted of two parts: whether the graduated response process set out in the settlement could be

implemented, firstly because it would involve the processing of sensitive personal data for the purposes of the Act, in that the data related to the commission of a criminal offence; and secondly, because access to the service would be cut off on the basis that the subscriber had committed an offence but without any investigation or determination of the offence by a court following a fair and impartial hearing. The judge found, however, that there was nothing in the settlement or protocol to suggest that anyone was being accused of a criminal offence and there was no issue beyond civil copyright infringement. The graduated response process was therefore lawful and could be implemented.

Given the competitive disadvantage of the settlement to Eircom, the record companies agreed to take similar court proceedings against other internet service providers. The proceedings are scheduled for hearing in the Commercial Court on 10 June 2010. It may also be noted that access to the Pirate Bay site through Eircom had already been closed down by court order in 2009.

EMI & others v. Eircom [2010] IEHC 108

http://www.irlii.org

Closure of Pirate Bay case: EMI v. Eircom [2009] IEHC 411, 24 July 2009

http://www.bailii.org/ie/cases/IEHC/2009/H411.html